PP

v.

KANG CHEE WHEI

HIGH COURT MALAYA, ALOR SETAR
BALIA YUSOF JC
[CRIMINAL TRIAL NO: 45-17-2001]
26 JANUARY 2002

CRIMINAL PROCEDURE: *Sentence - Causing death - Penal Code, s. 304(b) - Appropriate sentence - Whether calling for deterrent sentence - Plea of guilty - Whether could sway court not to impose longer imprisonment term*

The accused was convicted of an offence under s. 304(b) Penal Code for causing death to one Saw Boon Liat following a quarrel with the latter. Before the learned Judicial Commissioner, a question arose as to the appropriate sentence to be meted out, considering that the accused had struck the deceased with a crash helmet on the head, had pleaded guilty to the charge and had three previous convictions including one for criminal intimidation under s. 506 Penal Code.

Held:

[1] In the circumstances of the case, a sentence of nine years' imprisonment with effect from the date of arrest is fair and appropriate. (p 809 e)

[2] In passing this sentence, the court has taken every consideration in weighing the public interest, which demands a deterrent sentence, as well as the interest of the accused person. The accused has pleaded guilty to the charge and by such gesture has saved a lot of the court's time and public expenses and the inconvenience caused to many especially the witnesses. Without doubt, his plea of guilty has swayed this court in not imposing a longer imprisonment term. (pp 811 c-d, 812 h & 813 a-b)

[Accused convicted and sentenced accordingly.]

Case(s) referred to:
PP v. Jaafar Daud [1981] 1 MLJ 315 ***(refd)***
PP v. Law Kok Wai [1988] 3 MLJ 123 ***(refd)***
R v. Ball 35 CR App R 164 ***(refd)***
Saw Soo Kim v. PP [1975] 2 MLJ 134 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 12(2), 15(1), 38B
Penal Code, ss. 304(b), 506

For the prosecution - Murtazadi DPP
For the accused - Tay Chai Huat; M/s Tay Chai Huat & Co

Reported by WA Sharif

JUDGMENT

Balia Yusof J:

The accused was charged under an amended charge that reads:

> Bahawa kamu pada 2.6.2000 jam lebih kurang 11:30 malam berhampiran dengan Jejantas Lebuhraya, Jalan Bakar Sampan, Sungei Petani, di dalam daerah Kuala Muda di dalam Negeri Kedah Darul Aman, telah didapati melakukan homosid salah tidak terjumlah pada membunuh ke atas SAW BOON LIAT K.P. 720818-02-5059 dengan melakukan satu perbuatan dengan pengetahuan ia boleh menyebabkan kematian tetapi tanpa apa-apa niat untuk menyebabkan kematian itu dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 304(b) Kanun Keseksaan dan boleh dihukum di bawah Seksyen yang sama.

After the charge was read and explained to the accused, he pleaded guilty and he understood the nature and consequences of his plea. The prosecution then tendered a statement of facts narrating the offence. The accused admitted the facts as read and explained to him and the exhibits tendered. I accepted his plea and find him guilty on the amended charge.

The facts of the case disclosed that on 3 June 2000 at about 8.30am, one Saw Ah Lit received a phone call from his sister informing him that her son Saw Boon Liat (the deceased) has passed away. Upon reaching his sister's house at no. 1972 Lorong Makyong 5, Taman Ria Jaya, Sungai Petani, he saw the deceased's body in the living room of the house and noticed abrasions on the face and back of the deceased. A police report *vide* Sungai Petani Report 6052/2000 was lodged by him. The body of the deceased was subsequently sent to Hospital Sungai Petani and a post mortem was conducted stating the cause of death to be "fracture of skull and inter cranial bleeding". From the investigations carried out, it was revealed that the deceased had on 2 June 2000 at about 8.30pm gone out on a motorcycle. At about 11.30 pm a witness, one Lai long Boon who was passing by along Jalan Bakar Sampah saw the deceased seated on a motorcycle near an overhead bridge across the highway. At about the same time he saw a male Chinese rushing towards the deceased swinging a white crash helmet onto the deceased's head. The deceased did not retaliate

and fell. At the same time another witness one Goay Wooi Lean arrived at the scene. Upon the arrival of these two witnesses, the male Chinese sped away on a motorcycle. A while later another male Chinese named Ooi Hock Khan who is known to the deceased arrived at the scene and he was told by the deceased that he was hit by a person named Ah Wei with a crash helmet on his head. Ooi Hock Khan knows this Ah Wei to be Kang Chee Whei, the accused in this case. Ooi Hock Khan together with his two friends Rajen and Saravanan took the deceased to a private clinic and the deceased told the doctor that his injuries were sustained in a road accident. The deceased was then referred to Hospital Sungai Petani and after being informed that he was involved in a road accident he was given an outpatient treatment and allowed to go home with some medicine. The deceased was sent home by Rajen and Saravanan at about 1.45am on 3 June 2000 and went straight to his bedroom. The next morning he was found dead in his room by his mother. From the witnesses' account, the accused was identified as the person responsible for the offence and efforts were made to trace his whereabouts. On 25 October 2000 the accused was apprehended at the Immigration Complex Bukit Kayu Hitam. The accused subsequently led police to his house and showed the white crash helmet which he used to hit the deceased. The accused also admitted in this cautioned statement that he hit the deceased with the crash helmet after a quarrel with the deceased.

The quarrel started after the deceased refused to repay a loan for RM350 which was owed to the accused.

After hearing the plea of mitigation and a reply from the learned deputy Public Prosecutor, the court convicted the accused and sentenced him to nine years imprisonment with effect from the date of his arrest.

In his plea of mitigation, the accused through his counsel stated that he is a son of a lorry driver and he is also a lorry driver. By pleading guilty to the charge he has saved the court's time and that the incident happened during a quarrel with the deceased person and he used a helmet to assault the deceased. He is remorseful and vowed not to be violent in the future. He also pleaded for a lenient sentence and to be given a second chance to come back to society. He also pleaded for the sentence to be imposed on him from the date of his arrest.

The learned deputy Public Prosecutor in his reply urged the court to impose a sentence that is appropriate to the offence. The prosecution further submitted that a life has been lost and that public interest must be taken into consideration. The sentence to be imposed should serve as a lesson not only to the accused

but also to society in general. A plea of guilty is not a factor to mitigate the sentence to be imposed but a host of other factors must be considered in passing the appropriate sentence.

The accused has three previous convictions and his record of previous convictions was tendered in court. The offences for which he was convicted previously includes criminal intimidation under s. 506 of the Penal Code, possession of drugs under s. 12(2) of the Dangerous Drugs Act 1952 and administering drugs under s. 15(1) of the same Act.

In passing sentence against the accused, the court has taken into consideration the plea in mitigation by the accused as well as the reply by the learned deputy public prosecutor. In the court's view, it is without doubt that the crime committed by the accused is a serious one. An innocent life has been lost and the circumstances in which the crime is committed calls for a serious view by this court. The deceased was defenceless and striking the deceased with a crash helmet on the head, the most vulnerable part of the human anatomy is in certainty a very grievous offence. From the facts disclosed, the incident which led to the death of the deceased person arose from a trivial matter of asking for a debt which the deceased allegedly owed to the accused. What a pity, a crash helmet which is meant for protecting the human head has instead been misused by the accused as an instrument to cause the death of a person.

In passing the appropriate sentence against the accused I am guided by the established principles stated in *R v. Ball* 35 CR App. R 164 where the court of Criminal Appeal stated:

> In deciding the appropriate sentence, a Court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, served the public in two ways. It may deter others who ought be tempted to try crime as seeming to offer easy money on the supposition that, if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the Court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the Court has the right and the duty to decide whether to be lenient or severe.

In considering public interest, the court must show abhorrence to the nature of the offence committed by the accused. Public interest will be best served if an offender like the accused in this case be kept away from society. The basic element of public interest in my view is that, justice means not only justice to the accused but also justice to the society in general. The severity of the offence, far outweighs the other mitigating factors in this case and public interest also demands that a deterrent sentence ought to be imposed for offences of such severity as in the instant case before me. The deterrent effect of such sentence, it is hoped, not only serve as a lesson to the accused but also to deter others who may be tempted to the ways of such crime.

In handing down the sentence on the accused, I have given every consideration to his plea of guilty. It is without doubt that by pleading guilty to the amended charge, the accused has saved a lot of the court's time and public expenses and the inconvenience caused to many especially the witnesses.

In *Saw Soo Kim v. PP* [1975] 2 MLJ 134, Lee Hun Hoe CJ (Borneo) at p. 137 said:

> Whether a person is a hardened criminal or not, I feel that a plea of guilty should be treated as a mitigating factor. It not only saves the country a great expense of lengthy trial but also saves time and inconvenience of many, particularly the witnesses.

Be that as it may, it is well established that a guilty plea ought to be considered in favor of the accused only when all other factors and circumstances surrounding the commission of the offence justify such a consideration. In other words the application of this principle must rest on the peculiar facts and circumstances of the case itself. Mohamad Dzaiddin J (as he then was) in *PP v. Law Kok Wai* [1988] 2 CLJ 105; ([1988] 2 CLJ (Rep) 268) at p. 106 (p. 269) said:

> ... The extent to which a plea of guilty is a mitigating factor must depend on the facts of each case, and it cannot be a principal mitigating factor when effectively no defense to the charge was available to the accused (see *Archbold* (42nd Ed) para 4-480 citing *R v. Davis* [1980] 2 Cr App R 168).

From the facts presented by the prosecution, the offence was committed over a trivial matter of the alleged debt of RM350 owed by the deceased to the accused. The deceased was defenseless and was seated on a motorcycle. The accused was seen by a witness, one Tai Tong Boon who was passing by at that time, rushing towards the deceased and swung a crash helmet the onto head of the deceased. The deceased did not retaliate and fell to the ground. The accused immediately left the scene after that and disappeared. It was only after about five months later that the accused was apprehended at the

Immigration Complex in Bukit Kayu Hitam. The cause of death was certified to be fracture of skull and inter cranial bleeding and the post mortem report further indicated that there was contusion of the right eye upper lid and multiple abrasions on limbs. The manner and the circumstances in which the offence is committed merits serious view by this court. Society would not tolerate this kind of wanton and cruel act and far from condoning it. The accused ought to be taught a lesson for this brutal act. To borrow the words of the Court of Criminal Appeal again, this court "has the right and duty to decide whether to be lenient or severe, not only in regard to each crime, but also in regard to each criminal".

Another factor which this court has taken into consideration in meting out the sentence in this case was the accused's antecedent. The accused is aged 27 years and comes from a not so well to do family. He was employed as a lorry driver and so was his father. He is the eldest in the family of three and has a mother who is a housewife. From the record of previous convictions tendered in court as exh. P7 clearly indicates that the accused had a first brush with the law at the early age of nineteen when he was convicted for an offence under s. 506 of the Penal Code. That was in 1994. In 1997 and 1999 he was convicted for an offence of possession of drugs under s. 12 of the Dangerous Drugs Act 1952 for which he was sentenced to imprisonment for a term of 12 months and 18 months respectively. For the 1999 offence, the accused was also convicted under s. 15 of the same Act namely for the offence of administering drugs and was sentenced to 12 months imprisonment with effect from the date of arrest 21 March 1999. This sentence runs concurrently with the sentence of 18 months imprisonment mentioned earlier taking effect from the same date. Above and over that, the accused was also put under supervision for a period of two years under s. 38B of the Dangerous Drugs Act 1952 with security of RM2,000. From the narration of the above facts it is very clear that when the offence for which the accused stand charged now is committed, he must have just been released from prison and was still under supervision under s. 38B of the Dangerous Drugs Act 1952. There is hardly any gap between the release of the accused from prison and the commission of the offence for which he is charged now.

The importance of the accused's antecedent was stressed by Mohamed Azmi J (as he then was) in the case of *Public Prosecutor v. Jaafar b. Daud* [1981] 1 MLJ 315 whereby, courts in sentencing an accused person are required to call for evidence of information regarding the background, antecedent and character of the accused. Having this in mind, this court has considered the previous convictions of the accused, his background information as disclosed through his plea in mitigation and accordingly sentenced him to the term of imprisonment

for nine years to take effect from the date of his arrest. This court feels that the accused needs rehabilitation and in his case the prison would be the best place for him. At the same time he ought to be kept away from society and I can see no better opportunity to serve that purpose other than a stay in prison, long enough to deter him and to serve as a lesson to him. It is hoped that the accused, while in prison will learn some useful trade and be prepared to start a new life later on. The public interest is indeed served, and best served, if the accused is induced to turn from criminal ways to honest living. In passing this sentence, this court has taken every consideration in weighing the public interest as well as the interest of the accused person and without doubt his plea of guilty has certainly swayed this court in not imposing a longer or the maximum imprisonment term.